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Supreme Court of the United States

OCTOBER TERM, 1953

No. 1503

UNITED STATES OF AMERICA EX. REL. AUDREY M. TOTH,
Petitioner

vs.

HAROLD E. TALBOTT, Secretary of the United States Air Force, *Respondent*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Audrey M. Toth,[1] petitioner, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit reversing the judgment of the United States District Court for the District of Columbia. (R. 54) Judgment was entered in the District Court on September 3,

---

[1] This action was instituted on behalf of Robert W. Toth by Audrey M. Toth, his sister.

1953 on the return of a writ of habeas corpus ordering the release and discharge of civilian Robert W. Toth, brother of petitioner herein, from custody of the respondent herein, the Secretary of the United States Air Force. (R. 35) In reversing the district court the Court of Appeals ordered the case remanded with instructions to discharge the writ and return Toth to the custody of military authorities. (R. 53)

OPINIONS BELOW

The opinions of the district court are reported *sub nom.*, *Toth* v. *Talbott* at 113 F. Supp. 330 (D.C.D.C. 1953) and at 114 F. Supp. 468 (D.C.D.C. 1953) and are contained in the record at pages 21-23 and 30-33. The opinion of the Court of Appeals is contained in the record at pages 37-53 and is not yet reported.

JURISDICTION

The opinion and judgment of the United States Court of Appeals for the District of Columbia Circuit were entered on March 25, 1954. (R. 54)

The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. Sec. 1254, 62 Stat. 928.

QUESTIONS PRESENTED

The questions presented to the Court for consideration and determination are:

1. Whether the Congress may, without violating the Constitution of the United States, provide by legislation that a citizen of the United States who has been honorably discharged from the military service of the United States and who is engaged in a civilian occupation, not in any way connected with the armed forces, may be apprehended in Pennsylvania, arrested, confined, transported without a civil hearing of any kind to Korea and there detained for purposes of court martial on the order of the Secretary of

the Air Force charging him with the commission of a crime during his prior military service,

2. What authority, if any, does the Congress have to enact legislation providing for the court martial of a civilian?

3. Did not the Congress by enacting Article 3(a) of the Uniform Code of Military Justice exceed the powers granted it under Article 1, Section 8, Clauses 12 and 14 of the Constitution?

4. Did not the Congress by enacting Article 3(a) of the Uniform Code of Military Justice attempt to provide a system of criminal procedure for civilians different from that required and guaranteed by the Fifth and Sixth Amendments to the Constitution?

5. Did not the Congress in enacting Article 3(a) of the Uniform Code of Military Justice, fail to provide for the apprehension, arrest and detention of civilians whom it attempted to make amenable to military justice?

6. When does a *case* "arise in the land or naval forces" within the meaning of the Fifth Amendment to the Constitution?

STATUTES INVOLVED

Involved in this cause are the following provisions of the United States Constitution:

Article 1, Section 8. The Congress shall have power . . .

> Clause 12. To raise and support armies, but no appropriation of money to that use shall be for a longer term than two years; . . .
>
> Clause 14. To make rules for the government and regulation of the land and naval forces.

Amendment 5: No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases

arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any crminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law; nor shall private property be taken for public use without just compensation.

The Uniform Code of Military Justice, 64 Stat. 107-145; 50 U.S.C.A. § 551 *et seq.*, provides in pertinent part:

> Article 3(a): Subject to the provisions of Article 43, any person charged with having committed, while in a status in which he was subject to this code, an offense against this code, punishable by confinement of five years or more and for which the person cannot be tried in the courts of the United States or any State or Territory thereof or of the District of Columbia, shall not be relieved from amenability to trial by courts-martial by reason of the termination of said status. (64 Stat. 109, 50 U.S.C.A. § 553(a)).
>
> Article 9:
>
> (a) Arrest is the restraint of a person by an order not imposed as a punishment for an offense directing him to remain within certain specified limits. Confinement is the physical restraint of a person.
>
> . . .
>
> (c) An officer, a warrant officer or a civilian, subject to this code or to trial thereunder, may be ordered into arrest or confinement only by a commanding officer to whose authority he is subject, by an order, oral or written, delivered in person or by another officer. The authority to order such persons into arrest or confinement may not be delegated. (64 Stat. 111, 50 U.S.C.A. § 563(a), 563(c)).

STATEMENT OF THE CASE

Robert W. Toth, on whose behalf the petition for writ of *habeas corpus* was filed in the district court below, was honorably discharged from the United States Air Force

on December 8, 1952. (R. 1-2) Prior to his discharge he had served in Korea.

On April 8, 1953 an officer of the United States Air Force, Far East Air Logistic Command, signed court-martial charges under oath charging the accused with the murder in Korea of a Korean national and with conspiracy to commit murder against the same Korean national. It was charged that the alleged offenses were committed on or about September 27, 1952. (R. 15-17) Thereafter on April 30, 1953 the then Acting Secretary of the Air Force consented to and directed the apprehension of Mr. Toth by the Air Provost Marshal and directed the Air Provost Marshal to "cause him (Toth) to be delivered forthwith to the Commanding General, Fifth Air Force, to answer the said court-martial charges". (R. 20)

Thereafter, on May 13, 1953, Robert W. Toth was secretly arrested at his place of employment in Pittsburgh, Pennsylvania, by military authorities and, without being afforded a hearing of any type, was flown to Korea to face possible trial on the court-martial charges. (R. 2)

Subsequent to his arrival in Korea on May 27, 1953, a Petition for Writ of Habeas Corpus was filed on behalf of said Robert W. Toth by his sister, Audrey M. Toth. (R. 1) Harold E. Talbott was named as respondent in said petition in his capacity as Secretary of the United States Air Force, in that said respondent was illegally restraining, detaining and depriving said Robert W. Toth of his liberty. (R. 1) In said petition it was averred, *inter alia*, that the seizure and arrest of Toth constituted a denial of his rights of procedural due process, as guaranteed him as a citizen of the United States under the Fourth and Fifth Amendments of the Constitution; that he was likewise deprived of the rights guaranteed him by Rules 5 and 40 of the Federal Rules of Criminal Procedure; that Section 3(a) of the Uniform Code of Military Justice, insofar as it applied to Toth, was unconstitutional and void as being contrary to the Fourth and Fifth Amendments and as being vague and indefinite; and that

said Robert W. Toth as a civilian was not amenable within the framework of the Constitution to military seizure, arrest and trial by court-martial. (R. 1-6)

On the same day (May 27, 1953) a rule directing the respondent to show cause was issued. (R. 7) Thereafter, on June 25, 1953, after hearing, Judge Holtzoff of the United States District Court for the District of Columbia ordered that the writ of *habeas corpus* issue. (R. 24) In its opinion the district court stated:

> ". . . The fact is that there is an omission in the Code of Military Justice on this matter. No machinery is provided whereby a civilian can be arrested and removed to a distant point for trial by court-martial. It would be wrong for the Court to try to supply the machinery which Congress has omitted to furnish.
>
> This subject is a very serious one, as the Court sees it. One of the foundation stones of our Republic is that the civil power shall at all times be superior to the military power. *It is a grave matter for military police to arrest a civilian and remove him for trial forthwith, without a hearing, to a distant point in this country or to a foreign country, as is the case in this instance, when there is no provision in any statute authorizing this to be done.*" (R. 23) (Emphasis supplied).

Upon motion of respondent Talbott the effectiveness of this order for issuance of the writ of habeas corpus was stayed pending appeal. (R. 25-26) This appeal was subsequently dismissed by the United States Court of Appeals on the ground that the order appealed from was not final or otherwise appealable. (R. 27-28)

After additional proceedings in the district court, which are not germane to the issues presented here, the cause came on for hearing upon return of the writ on September 3, 1953. After full hearing the district court sustained the writ and ordered the discharge of the prisoner Robert W. Toth from custody. (R. 33) In its opinion the district court deemed it premature to pass upon the constitu-

tionality of Section 3(a) of the Uniform Code of Military Justice, but held that there was no statutory provision in the Uniform Code providing for the arrest and transportation of a civilian by the military. (*Toth* v. *Talbott*, 114 F Supp. 468, R. 30-33).

From this order discharging Toth from custody the Secretary of the Air Force appealed. (R. 35) The order of release was stayed pending appeal and Toth was released from custody under bond. (R. 34)

On March 25, 1954, the opinion and judgment of the United States Court of Appeals for the District of Columbia Circuit was entered reversing the judgment of the District Court. (R. 54) By its judgment the Court of Appeals ordered the cause remanded to the district court "with instructions to discharge the writ and to return Toth to the custody of the military authorities". (R. 53) The opinion of the Court of Appeals is set forth in the record at pages 37 through 53.

REASONS FOR THE ALLOWANCE OF THE WRIT

The questions to be presented to this Court for consideration and determination are at once novel, as being matters of first impression, and broad and far-reaching in their scope and ramifications.

Under one aspect, the Court is being called upon to consider and interpret the new Uniform Code of Military Justice, 64 Stat. 107-145, 50 U.S.C.A. §551 *et seq.* The statute herein concerned is extremely broad in scope; and is legislation which, in that part which is brought to the attention of the Court, directly affects the lives of many citizens of this country.

The questions sought to be presented are important to the proper administration of justice in this country. They present matters of substance directly relating to the construction and application of a statute of the United States and directly relating to the construction and interpretation of the Constitution of the United States. These

are matters which have not heretofore been but which should be settled and determined by this Court.

The questions are important to the determination of the proper separation of civil and military justice under our Constitution. Directly involved is the question of whether and to what extent, within the framework of the Constitution, the Congress can convert our democratic civil government into a military oligarchy. This is not a matter of academic interest only, but a matter of real and pressing importance which directly involves the lives and rights of some 16,000,000 citizens of this country. Under the Uniform Code of Military Justice and the opinion of the Court of Appeals in interpreting the applicable provisions of this Code, this many people, comprised of persons previously subject to military service, are deprived of all civil protection and are subject *nolens volens* to the rigors of military law and discipline.

It has been held by this Court almost from the beginning of our government that the military authorities are without jurisdiction to court-martial a civilian. *Wise* v. *Withers*, 7 U.S. (3 Cranch) 331 (1806). This complete and total lack of jurisdiction of the military over civilians has been reiterated by this Court in *Noble* v. *Union River Logging R. Co.*, 147 U.S. 165, 173 (1892) and again, as recently as 1938, in the case of *Stoll* v. *Gottlieb*, 305 U.S. 165, 176. The holding of the Court of Appeals below and its action in ordering the return of Toth to the military authorities are in direct conflict with the prior statements of this Court as set forth in those cases.

In the field of federal criminal law an accused civilian has certain guaranteed basic rights, such as, for example, the right to be free from an unreasonable seizure, the right to indictment by a grand jury, the right to trial by jury, the right to bail, the right to subpoena witnesses, the right to a *prompt* preliminary hearing, the right to counsel of his own choosing. In military law the rights granted the accused are not fundamental constitutional rights but are the rights afforded by statute. In the case

of *Burns* v. *Wilson*, 346 U.S. 139 (1953), this Court reiterated that due process of law in the military differed in material respects from due process in the civil sphere. Likewise this Court held, in *Ex parte Milligan*, 71 U.S. (4 Wall) 2 (1866), that the guarantees of the 5th and 6th Amendments are preserved to everyone accused of a crime who is not actually in military service.

The Court of Appeals below held with respect to Article 3(a) that: "In effect this section of the Uniform Code is no more than a provision by Congress that an honorable discharge from military service shall not be an absolution for crimes theretofore committed". (R. 41) But this completely begs the question. In *United States* v. *Grimley*, 137 U.S. 147 (1890) the Court held that one who had the status of a soldier was subject to court-martial; one not in such status is not subject to military discipline. The thrust of petitioner's case is not approval or disapproval of the end Congress sought to accomplish, it is rather the means to accomplish that end which are under attack. Congress cannot by legislative fiat turn a civilian into a soldier for the purpose of punishment.

Colonel William Winthrop, one of the recognized authorities on military law in this country whose treatise had been ordered printed at government expense for the information of army personnel, many years ago stated the question as follows:

> "But does the power to 'raise armies' extend to the inclusion of such civilians in the land forces? What are 'armies' in the sense in which this term is used in the Constitution? Its interpretation is to be found in the series of statutes dating from the period of the adoption of that instrument, and of which the constitutionality has not been questioned, by which the constituents of our armies or Army have been repeatedly defined. These constituents are a certain number of officers commissioned or appointed, and of soldiers enlisted, into the military service as such, bound to obey military orders and to perform military duty in peace or war, entitled to military pay, and

> remaining under military discipline and government till discharged in due form, or otherwise legally separated from the military state. Such are the 'armies' or 'land forces' which the Constitution authorizes Congress to raise, support and govern. Can this authority be held to include the raising or constituting, and the governing *nolens volens*, in time of peace, as a part of the army, of a class of persons who are under no contract for military service, but on the contrary have been formally discharged from all such contract, who render no military service, perform no military duty, receive no military pay, but are and remain civilians in every sense and for every capacity except the special one for which the statutes under consideration propose to reserve them? Can the authority to govern be extended to the disciplining of soldiers after they have been legally separated from the Army? In the opinion of the author, such a range of control is certainly beyond the power of Congress under the provisions of the Constitution referred to. That instrument, in a further provision also,—the Vth Amendment,—clearly distinguishes the military from the civil class as separate communities. It recognizes no third class which is part civil and part military—military for a particular purpose or in a particular situation, and civil for all other purposes and in all other situations —and it cannot be perceived how Congress can create such a class, without a disregard of the letter and spirit of the organic law." Winthrop, *Military Law and Precedents*, Gov't Printing Office (2d Ed. 1920), pp. 105-106.

Throughout the proceedings below petitioner had taken the position that Congress in enacting the Uniform Code of Military Justice failed to provide for the apprehension or arrest and detention of civilians whom it attempted to make amenable to military law. Section 3(a) of the Uniform Code provides in substance that discharge from military service does not relieve a person from amenability to trial by courts-martial for a crime committed while in service. However, it was the holding of the district court

in granting the writ of habeas corpus and discharging the petitioner from custody that there is an omission in the Uniform Code in that no provision is made for the arrest and detention of civilians. The correctness of the district court's holding in this regard is made evident by examination of Article 9 of the Code which deals with the "arrest", "apprehension" and "confinement" of persons subject to the Code.

Article 9(a) of the Uniform Code provides in part that: "Confinement is the physical restraint of a person." Article 9(c) provides in pertinent part that ". . . a civilian subject to this code or to trial thereunder may be ordered into arrest or confinement only by a commanding officer to whose authority he is subject, by an order, oral or written, delivered in person or by another officer. The authority to order such persons into arrest or confinement may not be delegated." Plainly, Toth as a civilian had no commanding officer "to whose authority he is subject", and plainly there was no one who could legally order his confinement or physical restraint. The record shows that court-martial charges were filed against Toth over the signature of a Colonel Hurst (R. 34) and that no further action was taken by any alleged "commanding officer"; but on the contrary, the Acting Secretary of the Air Force, not a commanding officer, but a civilian, consented to the court-martial charges and ordered the Air Provost Marshal to effect Toth's apprehension. (R. 20)

In its opinion the Court of Appeals held:

> "It is suggested that Articles 3(a) and 9(c) of the Uniform Code are inconsistent with each other. The latter Article provides that a civilian subject to the Code 'may be ordered into arrest or confinement only by a commanding officer to whose authority he is subject'. But 'arrest or confinement' in military parlance is restraint by order, as contrasted with a taking into custody, which is termed 'apprehension'. A strict distinction between the two is made in military rules. We see no inconsistency between the Articles." (R. 52)

With due respect to the Court of Appeals petitioner's contention is not "inconsistency" but a statutory omission. If the opinion and judgment of the Court of Appeals is allowed to stand we will in effect have a judicial determination that Congress can deprive civilians of constitutional guarantees by implication. In substance and effect so also we will have a judicial determination that the military is superior to the civil, in that by implication at least some 16,000,000 civilian citizens of this country have a commanding officer who can order, without hearing, their arrest and physical restraint.

In *Muskrat* v. *United States*, 219 U.S. 346 (1910) this Court had occasion to analyze, as contained in Article 3 of the Constitution, the meaning of the word "case". In its opinion this Court adhered to Mr. Chief Justice Marshall's definition in *Marbury* v. *Madison* (1 Cranch 137), that a "case" was a suit instituted according to the regular course of judicial procedure. This petitioner takes the position that "case" in the 5th Amendment has the same meaning as it does under Article 3. The Court of Appeals below however held that ". . . although a crime does not become a case, i.e. a legal proceeding, until a charge is made, a case *arises* when the crime is committed; just as a man is born on the day of his birth, although he is not a man until many years thereafter." (R. 41) It would appear that the Court of Appeals not only completely ignored prior rulings of this Court defining the very term in issue but ascribes to the term a meaning which would tend to make the constitutional guarantee a nullity. *Case* within the meaning of the 5th Amendment must be a legal proceeding; where else can a person "be held to answer" for a crime? If the amendment contained the word "cause" rather than "case", the lower court's language would be appropriate. Every "cause" does not become a "case", i.e. a legal proceeding. Every child does not become a man. But this Court is not being requested to correct the limping analogy of the appellate court; it

is being requested to reverse a holding that is plainly contrary to prior rulings of this Court and plainly contrary to the clear and unequivocal meaning of the language of the Constitution.

Should the opinion of the Court of Appeals be allowed to stand, the rights and liberties of millions of men and women who have served honorably in the armed forces are placed in jeopardy. In substance and effect the lower court has given the military *carte blanche* authority permitting the arrest and confinement of any discharged service man or woman. The Court of Appeals has advised the military in effect that, on a mere sworn statement alleging the commission of a crime, without a judicial inquiry of any type to determine probable cause, armed soldiers may seek and effect the arrest of a civilian no matter where he may be or what his station or circumstance may be and, having arrested him, secretly transport him anywhere in the world. The issue sought to be presented to this Court for determination is not the guilt or innocence of one man. The issue is whether Congress can validly legislate military despotism. If the Writs of Assistance, used so unconscionably by the British in Colonial days, were so abhorrent to our founding fathers as to give rise to Constitutional safeguards, wherein lies the power under the Constitution to give sanction to the oppressive and high-handed conduct set forth in the record herein?

This case presents a flagrant abuse of the indefeasible right of a citizen of this country to his personal security, as guaranteed to him by the Fourth Amendment.

This case presents an egregious example of the deprivation of a civilian's right to be held to answer for a capital or otherwise infamous crime only upon indictment of a grand jury and of his right not to be deprived of his liberty without due process of law as guaranteed to him by the Fifth Amendment.

This is an important case. It is not academic; the matters brought to the attention of the Court are real and pressing. Eternal vigilance, they say, is the price we must pay for our liberty. The facts of this case clearly show that liberty as we have heretofore known it may, if we are not vigilant, soon become a thing of the past. This Court is being requested to determine whether the Constitution is yet the shield of our liberty; still the bulwark of due process of law; still the bastion for protection of the rights of our citizens from the overweening despotism of the military.

CONCLUSION

WHEREFORE, the petitioner prays the granting of the writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit.

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